

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5406 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

ASLAM @ BODIYA HAYDERMIYA SAHIKH

Versus

COMMISSIONER OF POLICE

Appearance:

MR ADIL MEHTA for Petitioner

MR HH PATEL AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 29/12/1999

ORAL JUDGEMENT

Commissioner of Police, Baroda City, Baroda
passed an order on 28th March, 1999 in exercise of powers
under Section 3(2) of the Gujarat Prevention of
Anti-Social Activities Act, 1985 [hereinafter referred to

as, 'the PASA Act'] detaining Aslam @ Bodiya Haydermiya Shaikh of Navapura, Mehboobpura, Baroda under the provisions of the PASA Act.

2. The grounds of detention of the even date indicate that the detaining authority took into consideration 11 offences registered against the detenu, punishable under sections 457, 380 and 114 of the Indian Penal Code. The detaining authority also considered statements of three anonymous witnesses whose identity has not been disclosed by the detaining authority in exercise of powers under section 9 (2) of the PASA Act. The detaining authority felt satisfied on verification that the fear expressed by the witnesses was genuine and there was imminent danger to the person and property of the witnesses from the detenu, if the identity of the witnesses is disclosed, and therefore, the detaining authority decided to exercise powers under Section 9 (2) of the PASA Act. The detaining authority further observed in the grounds of detention that the activities of the detenu are detrimental to 'public order'. He is a 'dangerous person' as defined under the PASA Act, and therefore, it is necessary to immediately prevent him from pursuing his illegal and anti-social activities. Resorting to less drastic remedies under the other laws were found by the detaining authority to be not so efficacious as the remedies under the PASA Act, and therefore, the authority concluded that detention under PASA Act has to be resorted to.

3. The petition is preferred by the detenu. Various grounds are raised in the petition. The main ground is that there is a delay in communication of decision on the representation made on behalf of the detenu. The second ground is that the subjective satisfaction recorded by the detaining authority for the need for exercising of powers under Section 9 (2) of the PASA Act is not proper and genuine as the detaining authority did not have any contemporaneous material for its consideration for recording satisfaction about the genuineness of the fear expressed by the anonymous witnesses.

4. Mr. Mehta, learned advocate appearing for the petitioner has restricted his arguments to the above grounds. He submitted that the representation was made on 24th April, 1999. The same was decided on 4th May, 1999 which came to be communicated to the detenu on 28th May, 1999. The delay between 4th May and 28th May, 1999 has not been explained by the detaining authority in its affidavit-in-reply. Mr. Mehta, therefore, submitted that this infringed the right of the detenu of making an

effective representation.

4.1 On the other count, Mr. Mehta has submitted that if the grounds of detention and the affidavit-in-reply are seen, it is clear that the detaining authority did not have any contemporaneous material before it which could have possibilised for the authority to arrive at an independent and genuine subjective satisfaction about the need for exercising of powers under Section 9 (2) of the PASA Act. In this regard, Mr. Mehta pressed into service, the decision of Full Bench of this Court in the case of Chandrakant Patel v. State of Gujarat & Ors. [1994 (1) GLR 761] and submitted that the petition, therefore, may be allowed.

5. The petition is opposed by Mr. H.H Patel, learned AGP. He submitted that the detaining authority has taken into consideration material which was before it and on arriving at the subjective satisfaction, the order is passed. He has drawn attention of this Court to paragraph 10 of the Affidavit-in-Reply and submitted that the order was passed after careful scrutiny, examination and considering the material placed before the detaining authority and on personal verification as to the genuineness, correctness and veracity of the antecedents narrated in the statement of witnesses in respect of unregistered offences, and thereafter, the apprehension was found by the detaining authority to be proper, real, genuine and reasonable, on application of mind to the facts of the case. He, therefore, submitted that the petition may, therefore, be rejected.

6. A perusal of the grounds of detention indicate that the detaining authority has found that the witnesses apprehended danger to their person and property which is found by the detaining authority to be reasonable, genuine and correct, and therefore, powers u/s. 9 (2) of the PASA were exercised. In Affidavit-in-Reply, the detaining authority has stated that the detaining authority had carefully scrutinized, examined and considered material placed before it and after personally verifying the genuineness and correctness of the veracity of the incidents narrated by the witnesses in their statements, and on being satisfied that the fear expressed by the witnesses was proper, real, genuine and reasonable, the authority exercised powers under Section 9 (2) of the PASA Act and accordingly claimed privilege. It is stated that the witnesses were not ready and willing to come forward to register a complaint against the detenu because of fear and apprehension of danger to their life and property and that of their family members.

It is, therefore, clear that the detaining authority is not coming with any specific case that it did have any contemporaneous material other than statement of witnesses to record the satisfaction about genuineness and correctness of the apprehension shown by the witnesses qua the detenu in respect of life and property of the witnesses. In the case of Chandrakant N. Patel [Supra] it is held that, 'since the satisfaction in this behalf [exercise of powers u/s. 9 (2)] has to be of the detaining authority, obviously, the promise of confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding disclosure of such particulars and materials. But if, after considering the general background, character, antecedents, criminal tendency or propensity, etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then it cannot be said that the same was not done in public interest, and that public interest is likely to be subserved by non-disclosure did not out-weigh or over-ride the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu.' This indicates that it is expected of the detaining authority to take into consideration contemporaneous material. In this view of the matter, when the authority does not come with a case of having contemporaneous material for arriving at subjective satisfaction; except the statement of witnesses, the satisfaction recorded by the authority for the need of exercise of powers u/s. 9 (2) of the Act cannot be said to be genuine. This has obviously affected the right of the detenu of making an effective representation and the continued detention, therefore, would stand vitiated.

7. At this stage, Mr. Mehta states that he does not press for a verdict on the other point raised by him during the course of arguments.

8. The petition, therefore, deserves to be allowed on the grounds stated above.

9. Petition is, therefore, allowed. The order of detention passed by the Commissioner of Police, Baroda City, Baroda on 28th March, 1999 in respect of Aslam Bodiyo Haydermiya Shaikh is hereby quashed and set-aside. The petitioner be set at liberty forthwith; if not required in any other case. Rule is made absolute with no order as to costs.

[A.L Dave, J.]

Prakash*